IN THE

Supreme Court of the United States

October Term, 1955

No. 111

DANIEL CASTANEDA GONZALES, *Petitioner,*

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, and HERBERT BROWNELL, JR., *Attorney General of the* United States, *Respondents,*

BRIEF OF AMICUS CURIAE

(Francisco Mendoza-Martinez)

I.

INTRODUCTION

A. Interest of This Amicus Curiae:

This amicus curiae is plaintiff in an action designated as Francisco Mendoza-Martinez v. Argyle R. Mackey, The Commissioner of Immigration and Naturalization, and Herbert Brownell, Attorney General of the United States, in the United States District

Court for the Southern District of California, Northern Division. In this action plaintiff sought a judgment declaring him to be a United States citizen. All operative facts necessary to the application of 401-J of the Immigration and Nationality Act of 1940 were stipulated to by the plaintiff, and it was conceded on behalf of the United States that plaintiff was a native of the United States. Plaintiff's sole ground for his action was his contention that the said Section 401-J is unconstitutional. Judgment for the defendants was rendered in the aforesaid court, and plaintiff has filed his notice of appeal to the Court of Appeals for the Ninth Circuit. In the case now before this Court it would appear that the principal issue is the constitutionality of the same section. Accordingly it seems probable that all of the rights of this amicus curiae will be determined in the instant case rather than in his own.

B. The Scope of This Brief:

Proponents of the constitutionality of the statute here challenged, and its companion subsections, have advanced two independent and unrelated theories in support of their contention: On one hand it is alleged that Congress is empowered by the doctrine of implied powers, or by the fact of its sovereignty, to regulate the divestment as well as the investment of citizenship; and on the other it is conceded that expatriation can be accomplished solely by voluntary choice, but it is contended that Congress is empowered to define those acts by which that voluntary choice shall be made known.

The first position, deriving its principal strength from *McKenzie* v. *Hare*, 239 U.S. 299, we leave to

others of like interest for refutation, believing that this Court will allow no sophistic avoidance of its vigorous announcement in 1898 that Congress is without power to abridge the right of citizenship acquired by birth. (*United States* v. *Wong Kim Ark,* 169 U.S. 649)

It is to the second proposition that we address ourselves here, it being our purpose to implement by further analysis the succinct summation of Presiding Judge McLaughlin of the District Court of Hawaii: "*The right of expatriation is not to be converted into a liability by Congressional fiat.*" (*Okimura* v. *Acheson,* 111 Fed. Supp. 303)

C. By Way of Preamble: The Abridgement of a Fundamental Right Is in Issue Here

In *Miranda* v. *Clark,* 180 F.(2d) 257, and again in the instant case, the Ninth Circuit Court of Appeals has declared itself bound by the provisions of the statute "unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation." We submit that this application of the ordinary presumption of constitutionality should be counter-balanced by the same liberal construction in favor of the citizen and careful weighing of any abridgment which this Court has insisted upon where fundamental liberties are involved. (*Marsh* v. *State of Alabama,* 326 U.S. 501; *Thornhill* v. *Alabama,* 310 U.S. 88) Basic as are those specially guarded liberties, they are rooted in turn in the right of citizenship itself. Surely it would be a small gain to this petitioner that his right to speak and worship freely remained inviolate, if he were denied his right to remain on this soil to exercise it. It would seem proper, therefore,

that the deprivation of citizenship sought to be sustained here should be subjected to the most careful scrutiny.

II.

ARGUMENT

The Section Here Complained of Is an Unconstitutional Conclusive Presumption

It has repeatedly been held that the relinquishment of citizenship is a voluntary act. (*Savorgnan* vs. *U. S.*, 338 U.S. 491; *Perkins* v. *Elg.*, 307 U.S. 325; *Tomoya Kawakita* v. *U. S.*, 190 F.(2d) 506, affirmed 343 U.S. 717; *Doreau* v. *Marshall*, 170 F.(2d) 721; *Lehman* v. *Acheson*, 206 F.(2d) 592)

Section 401-J of the Immigration and Nationality Act of 1940, together with its companion sections and their predecessors and successors, has been most frequently justified as merely a Congressional definition of the means by which this voluntary expatriation shall be accomplished. (Thus cf. the instant case, *Gonzales* vs. *Landon*, 215 F.(2d) 955.) It is therefore difficult to imagine how the section can escape being designated as an evidentiary presumption.

In *Savorgnan* v. *U. S.*, 330 U.S. 491, this Court has held that such a presumption may not be rebutted by a showing that the subjective intent to relinquish citizenship was lacking. Accordingly there would seem also to be no escape from the proposition that the presumption is a conclusive one.

An examination of earlier Immigration Acts lends additional credence to the conclusion that Congress, in enacting these sections, has in fact created evidentiary presumptions. The pertinent language in

the Nationality Act of 1907 reads: "Any citizen shall be *deemed* to have expatriated himself when . . . ." And it seems well established that "deemed" is synonymous with "presumed." (*U. S.* v. *Davis,* 50 F. (2d) 903, 904; *Cooper* v. *Slaughter,* 50 So. 477, 481; *In re Waldron's Estate,* 267 Pac. 191; *Moody* v. *State,* 17 SW (2d) 919, 920)

The same language was not retained in the later statutes, but a change in form will not change a statutory presumption into something else, if such it remains in practical effect. (*Schlesinger* v. *Wisconsin,* 270 U.S. 230)

The act of departing from or remaining outside of the United States with intent to avoid military service, then, gives rise under the challenged sections to a conclusive presumption of voluntary relinquishment of citizenship.

The question next presented is by what criterion this presumption shall be tested to determine whether it satisfies the requirements of due process of law. It is here, we believe that the inner infirmity of the challenged statute is plainly exposed. One writer has framed the pertinent rule this way:

> "The general proposition is supported by many cases that a legislature cannot constitutionally make one fact conclusive evidence of another material fact in controversy if the former is not, *in and of itself,* conclusive." (86 ALR 182) (Emphasis ours)

In thus framing the rule the writer relied principally on the case of *Heiner* v. *Donnan,* 285 U.S. 312, in which this Court held in part as follows:

> "The government makes the point that the conclusive presumption created by the statute is a

rule of sub tantive law, and, regarded as such, should be upheld; and decisions tending to support that view are cited. The earlier revenue acts created a prima facie presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof; (citations) and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one it is open to challenge and disproof, and in the other, conclusive. *However, whether the latter presumption be treated as a rule of evidence or of substantial law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality,* and the result is the same, unless we are ready to overrule the *Schlesinger* case, as we are not; for that dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. *This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.* (Citations) 'It is apparent,' this Court said in the *Bailey* case (pg. 239), 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can violate by direct enactment. *The power to create presumptions is not a means of escape from constitutional restrictions.*'" (Emphasis ours)

Judge McLaughlin has protested, as above, that "the right of expatriation is not to be converted into a liability by *Congressional* fiat." In the case just quoted this Court struck down "an attempt by *legislative fiat* to enact into existence a fact which here does not and cannot be made to, exist in actuality."

The remaining question, then, is whether Congress has so exceeded its power here. In other words, is the act of departing from or remaining outside of the United States with intent to avoid military service the *conclusive equivalent of a voluntary renunciation of United States citizenship?*

The question would seem to answer itself. Whether the Kentucky hills, the Rocky Mountains, or Mexico be used as a haven for purposes of draft evasion is an accident of geographical location, not differing intent. The youth of French-Canadian descent in Northern Vermont would seek refuge in Montreal in no different frame of mind than the Arkansas boy would retreat to the Ozarks.

And more broadly, the motivations behind draft evasion, while never honorable and almost uniformly reprehensible, are rarely consonant with a desire to renounce one's nationality. Instead, common experience indicates that physical fear, economic avarice, and even unadorned ignorance are far more commonly the causes of draft evasion than the choice of another nation above one's homeland. *Surely the failure to meet standards of good citizenship cannot allowably be tortured into a desire to renounce citizenship itself.*

Indeed, the very date of the passage of the challenged section bespeaks its real purpose and implies a denial of any direct relationship with voluntary expatriation. In 1944 the nation was moving toward the peak of its war effort. Understandably, Selective Service authorities desired to have every possible enforcement instrument placed at their disposal. Most particularly was it important that evasion-minded young men be dissuaded from traveling beyond the reach of enforcement officials. Loss of citizenship

was a powerful deterrent for this purpose, and it was natural that it should be seized upon.

But it needs no saying here that the proper motivation of the authors of this statute cannot lessen the infringement, nor can it ameliorate the dangers arising therefrom. In Judge McLaughlin's phrase, a right has been converted into a liability by legislative fiat; this, we submit, is the inescapable vice.

III.

CONCLUSION

We believe that this Court is concerned here with the keystone of all the rights it guards, and that the Court may therefore well consider whether it should not balance the presumption of constitutionality with a most cautious skepticism regarding the propriety of the regulation.

But whether or not this petitioner's burden be thus lightened, the attention of the Court is once more invited to its rule in the *Donnan* case supra: "A statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." The petitioner now before the Court has had no opportunity to deny his lack of intent to relinquish his nationality; Congress has decreed that by crossing an international border to escape military service, he has conclusively evidenced it. We urge that in so doing, it has clearly exceeded the authority delegated to it.

Respectfully submitted,

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BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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Interest of American Civil Liberties Union

This brief is submitted upon the consent of the parties. The American Civil Liberties Union is an organization devoted to the protection of various personal rights guaranteed by the Constitution. Among these it considers the rights of citizenship of prime importance. It is concerned lest the decision in the case at bar stand as authority for Congressional dilution of such rights. We shall concern ourselves solely with this basic issue of power.

Point To Be Argued

Whether or not Congress may deprive a native born citizen of his Constitutionally guaranteed right without his consent and, as a subsidiary issue, whether such consent can be based on acts that have no direct relation to citizenship.

Argument

The case arises under Section 401(j) of the Nationality Act of 1940 [then 8 U. S. C. 801(j), now 8 U. S. C. 1481(a)(10)] which declares that citizenship may be lost by absence from the country in time of war or national emergency for the purpose of avoiding military training. The government claims that petitioner lost his citizenship because, having been taken to Mexico by his parents when an infant, he remained there until April 1946, when he was not quite 22 years old, and that he had admitted that draft evasion was the reason for his remaining in Mexico.

Despite the statement in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703, that the Constitution had not given Congress any express power to take away citizenship, it has been recognized by Congress that a citizen can expatriate himself and that the consent of Congress to such expatriation is necessary. Accordingly Congress has, from time to time, enacted laws declaring that certain acts amount to such expatriation. We shall hereafter discuss these in the light of what we conceive to be the applicable principle as declared by this Court.

The first case is *Mackenzie* v. *Hare*, 239 U. S. 299, which held that a native born woman could lose her citizenship by marriage to an alien. At the time of her marriage the law provided that loss of nationality would result (34 Stat. 1228). This Court upheld that law, in its application to the plaintiff then before it, because of the ancient principle of "identity" of husband and wife.

As Mr. Justice McKenna said (p. 311):

> "* * * and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy * * *."

And (p. 312):

> "* * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected."

The considerations which led this Court to that conclusion are, of course, wholly absent here.

In *Perkins* v. *Elg*, 307 U. S. 325, this Court ruled that citizenship could not be lost because of parental action during minority. Chief Justice Hughes said (p. 334):

> "* * * Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."

Here, as there, a native born citizen was, when a young child, taken by his parents to a foreign country and, after

becoming of age, returned to the United States. However, unlike the *Elg* case, there is no claim of acquisition of foreign nationality by the parents. *A fortiori* there was here no loss of citizenship merely because of petitioner's stay in Mexico.*

In *Savorgnan* v. *United States,* 338 U. S. 491, this Court held merely that a native born citizen who voluntarily became a citizen in a foreign country had thus expatriated herself, at least when she took up actual residence in the country of her choice.

In *Kawakita* v. *United States,* 343 U. S. 717, this Court held that there had in fact been no expatriation—or at least that the triers of fact could so find—and therefore a conviction for treason was upheld.

Mandoli v. *Acheson,* 334 U. S. 133, dealt with dual nationality. The government claimed that American citizenship had been lost by service in the Italian army. But this was held no ground because the service and the accompanying oath of allegiance were not voluntary. The further claim that citizenship was lost because of failure to return to the United States upon reaching 21 years was rejected by this Court because the provision dealing with that subject affected only naturalized citizens. The Court, therefore, did not discuss any questions of Congressional power and the dissenters based their views solely on the fact that an oath of allegiance to Italy had been taken by the plaintiff.

These opinions of this Court suggest the principle that Congress may provide for loss of nationality—or in another sense, consent to the citizen's surrender of his nationality—in cases where the citizen has, by his own volun-

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* Indeed it may well be that no inference can be drawn even from a finding that, during infancy, petitioner remained in Mexico to avoid military service. See *United States ex rel. Baglivo* v. *Day,* 28 F. 2d 44; *Podea* v. *Marshall,* 83 F. Supp. 216 [rev'd on other grounds, 179 F. 2d 306].

tary act either acquired a new nationality or chosen to adhere to other than American nationality where dual citizenship exists. We submit that this is the extent of Congressional power and that there can be no question of loss of American nationality (and therefore none of consent to such loss) where no other nationality has been acquired.

We shall attempt to classify the various sections of the Nationality Act in the light of this principle. (For the sake of completeness we are considering the Act of 1952 although, of course, only one of its provisions is applicable here.)

Section 1481(a) provides for the loss of nationality under circumstances some of which involve allegiance to another country and some of which do not. Thus subdivisions (1), (2), (3), (4) and (5) all involve some act which may be interpreted (depending on the circumstances) as a voluntary expatriation in favor of another country.* Subdivisions (6) and (7), while not on their face suggesting adherence to another country, at least require a formal act of renunciation. But the remaining subdivisions [(8), (9) and (10), of which the last covers this case †] have neither apparent nor real relationship to expatriation in favor of another country or even to expatriation at all [except perhaps with reference to a conviction for treason referred to in subdivision (9)]. They are penalties added to various activities believed by the Congress to be harmful to the interests of the country.

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* But subdivisions (3) and (5) have been held unconstitutional because not necessarily involving voluntary expatriation: *Okimura* v. *Acheson*, 99 F. Supp. 587, id. 111 F. Supp. 303, and *Murata* v. *Acheson*, 99 F. Supp. 591, id. 111 F. Supp. 306. This Court's decision (342 U. S. 899, 900) did not touch the issue of power. And in *Igarashi* v. *Dulles*, Hawaii Civil 1240, not reported, the same result was reached with regard to subdivision (4). It is not necessary, in the case at bar, to pass on the correctness of those decisions, since the subdivision here involved has no relation, direct or otherwise, to acquiring nationality elsewhere.

† Section 401(j) of the 1940 Act (then 8 USC 801j).

It will be noted, however, that, with respect to the subdivision here applicable (10), it is not required that there shall have been any previous criminal conviction—although the acts described might be punishable as an evasion of the draft [see 50 USC App. § 462]. Therefore it is not necessary to decide here whether Congress could constitutionally include loss of nationality directly as punishment for crime.

In paragraph (b) of this section Congress seems to have had some doubts about the reach of the previous provisions. For, in rejecting possible claims that certain of the acts might have resulted from duress, it declared a conclusive presumption of voluntariness where, among other things, the person was a "national" of the state in which the act occurred. Thus Congress appears to have recognized that the various de-nationalizing provisions might have no meaning except in cases where dual nationality was originally involved or a new nationality actually acquired. The same thought is expressed in Section 1482 which deals with certain aspects of dual nationality.

CONCLUSION

It is respectfully submitted, therefore, that the subdivision here relied upon is unconstitutional since it compels loss of nationality despite the fact that there is no contention that the act from which this result flows involved the acquisition of any other nationality.

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